Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID L. SMITH,

Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, and UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

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62 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Mr. Smith was "in custody" for purposes of filing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence attacking on Fifth Amendment due process grounds his suspension and disbarment from the practice of law in the United States Court of Appeals for the Tenth Circuit and the United States District Court for the District of Colorado.

Whether by issuing its (April 9, 1998) order affirming Judge Daniel's (January 21, 1998) order dismissing Mr. Smith's petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence without addressing the issues raised by him in his motion for issuance of certificate of appealability and in his appellate brief, the Tenth Circuit hearing panel deprived him of his right to meaningful appellate review under 28 U.S.C. § 2253.

Whether the Tenth Circuit hearing panel committed reversible error by finding and concluding that "sanctions are appropriate" because of Mr. Smith's alleged "abuse of the judicial process."

Whether by issuing its (May 13, 1998) order instructing the Clerk of the Tenth Circuit to refuse to accept for filing any submissions from Mr. Smith which further contest his suspension and

disbarment from the practice of law in the Tenth Circuit and the District Court, ordering him to pay $500.00 to the Clerk of the Tenth Circuit for appealing Judge Daniel's (January 21, 1998) order dismissing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence, and summarily denying his petition for order reinstating him to the practice of law in the Tenth Circuit and the District Court, as well as his request for an evidentiary hearing on this petition, the Tenth Circuit hearing panel deprived Mr. Smith of his First Amendment right to access to the federal courts to petition the government for a redress of grievances, as well as his Fifth Amendment right to due process of law.

Whether by issuing its (June 1, 1998) order denying Mr. Smith's petition for rehearing of its (May 13, 1998) order without addressing the issues raised by him therein, the Tenth Circuit hearing panel demonstrated that it has no intention of reviewing, reconsidering and correcting the gross miscarriage of justice being perpetrated against Mr. Smith--another blatant and egregious violation of his First and Fifth Amendment rights.

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IN THE MATTER OF DAVID L. SMITH, Disciplinary Action No. 93-DP-28 (D. Colo. February 10, 1995) (unpublished order).

In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, 136 L.Ed.2d 125 (1996).

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David L. Smith v. United States District Court for the District of Colorado; United States Court of Appeals for the Tenth Circuit, No. 98-1030 (10th Cir. June 1, 1998) (unpublished order).

JURISDICTION

The orders sought to be reviewed were entered on November 29, 1993, February 10, 1995, February 13, 1996, April 26, 1996, January 21, 1998, April 9, 1998, May 13, 1998, and June 1, 1998. Rehearing of the Tenth Circuit hearing panel's (May 13, 1998) order was summarily denied by order dated June 1, 1998.

The statutory provision believed to confer jurisdiction on this Court to review on writ of certiorari the foregoing orders is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amend. I, U.S. Consti.

Amend. V, U.S. Consti.

28 U.S.C. § 2241

28 U.S.C. § 2253

28 U.S.C. § 2255

See the Appendix hereto for the full text of the pertinent portions of the constitutional provisions and statues involved in the case.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and to the United States District Court for the District of Colorado:

I. STATEMENT OF THE CASE

On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals in four federal civil rights cases, and for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado, all in alleged violation of the ABA Code of Professional Conduct. See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been "satisfied." See id.

On February 10, 1995, the three-judge disciplinary panel of the United States District Court for the District of

Colorado issued its order indefinitely suspending Mr. Smith from the practice of law in the District Court based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. Mr. Smith may apply for reinstatement to the District Court bar when the Tenth Circuit lifts its suspension of him.

On February 13, 1996, the Tenth Circuit disciplinary panel issued its order disbarring Mr. Smith from the practice of law in the Tenth Circuit for allegedly practicing law in the Tenth Circuit in violation of its (November 29, 1993) suspension order, and for allegedly practicing law in the Tenth Circuit "without authorization." See In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, 136 L.Ed.2d 125 (1996).

On April 26, 1996, the District Court disciplinary panel issued its order disbarring Mr. Smith from the practice of law in the District Court based on the Tenth Circuit disciplinary panel's (February 13, 1996) order of disbarment.

On November 17, 1997, Mr. Smith filed his petition for a writ of habeas corpus, and motion to vacate set aside or correct sentence, alleging that he was "in custody" under or by color of the authority of the United States, for an

act done or omitted in pursuance of an order, process, judgment or decree of a court or judge of the United States, and in violation of the Constitution or laws of the United States. See 28 U.S.C. § 2241. Mr. Smith also alleged that he was "in custody" under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See 28 U.S.C. § 2255. Mr. Smith requested the District Court to grant his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence, and such other and further relief as may be just under the circumstances, including an order reversing and declaring void ab initio the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, its (February 13, 1996) order of disbarment, the District Court disciplinary panel's (February 10, 1995) suspension order, and its (April 26, 1996) order of disbarment.

On January 21, 1998, United States District Judge Wiley Y. Daniel issued his order dismissing Mr. Smith's petition for a writ of habeas corpus, and motion to

vacate, set aside or correct sentence for lack of subject matter jurisdiction.

On April 9, 1998, a three-judge hearing panel of the Tenth Circuit issued its order affirming Judge Daniel's (January 21, 1998) order of dismissal without addressing the issues raised by Mr. Smith in his motion for issuance of certificate of appealability and in his appellate brief.

On May 13, 1998, the Tenth Circuit hearing panel issued its order instructing the Clerk of the Tenth Circuit to refuse to accept for filing any submissions from Mr. Smith which further contest his suspension and disbarment from the practice of law in the Tenth Circuit and the District Court, and ordering him to pay $500.00 to the Clerk of the Tenth Circuit for appealing Judge Daniel's dismissal of his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence. The Tenth Circuit hearing panel also summarily denied Mr. Smith's petition for order reinstating him to the practice of law in the Tenth Circuit and the District Court, as well as his request for an evidentiary hearing on this petition.

On June 1, 1998, the Tenth Circuit hearing panel issued its order denying Mr. Smith's petition for rehearing of its

(May 13, 1998) order without addressing the issues raised by him therein.

II. ARGUMENT

In his (January 21, 1998) order of dismissal, Judge Daniel found and concluded that Mr. Smith was not "in custody" for purposes of filing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence. However, "in custody" means that the petitioner is subject to "restraints not shared by the public generally." See Jones v. Cunningham, 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963); see also Hensley v. Municipal Court, 411 U.S. 345, 351, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973)(continuing government supervision is sufficient for this purpose); Olson v. Hart, 965 F.2d 940, 942-943 (10th Cir. 1992)(probation is sufficient); Zal v. Steppe, 968 F.2d 924, 926 (9th Cir.), cert. denied, 506 U.S. 1021 (1992)(case was not moot since attorney faced possible disciplinary action); DePompei v. Ohio Adult Parole Authority, 999 F.2d 138, 140 (6th Cir. 1993)(revocation of medical license is sufficient); Nakell v. Attorney General of North Carolina, 15 F.3d 319, 323 (4th Cir.), cert. denied, 513 U.S. 866 (1994) (attorney released on own recognizance following contempt conviction was "in custody"); Oyler v. Allenbrand, 23 F.3d

292, 294 (10th Cir.), cert. denied, 513 U.S. 908 (1994) (possible use of conviction to enhance future sentence was sufficient adverse consequence); Santos v. Franklin, 493 F.Supp. 847 (D.C. Pa. 1980) (activation of reservist from ready reserve to active military satisfied jurisdictional requirement of "in custody").[1] In the present case, the Tenth Circuit and District Court disciplinary panels have suspended and disbarred Mr. Smith from the practice of

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[1]Even adverse collateral consequences of a conviction have been found to satisfy the "in custody" jurisdictional requirement. See Carafas v. LaVallee, 391 U.S. 234, 238, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Evitts v. Lucey, 469 U.S. 387, 391 n.4, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Larche v. Simons, 53 F.3d 1068 (9th Cir. 1995) (presumption of collateral consequences is irrebutable, even in misdemeanor cases); but see Maleng v. Cook, 490 U.S. 488, 492, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) (per curiam) ("once the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual 'in custody' for the purposes of a habeas attack upon it"); Waldon v. Cowley, 880 F.2d 291, 292 (10th Cir. 1989) (civil collateral consequences not sufficient).

law in the Tenth Circuit and the District Court. Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the District Court has been "satisfied"--an impossible task considering the fact that the Tenth Circuit and District Court disciplinary panels have steadfastly refused to review, reconsider and correct their transparently invalid suspension and disbarment orders.[2] Mr. Smith may

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[2]As a part of his efforts to persuade the Tenth Circuit and District Court disciplinary panels to review, reconsider and correct their transparently invalid suspension and disbarment orders, Mr. Smith submitted affidavits and other evidentiary materials showing that he was financially unable to pay all or any part of the more than $50,000.00 in harsh and unjustified sanctions previously imposed against him by the Tenth Circuit and the District Court. At the time of the submission of these evidentiary materials, Mr. Smith had a negative net worth of more than $360,000.00. Currently, Mr. Smith has a negative net worth of more than $400,000.00. Due to his suspension and disbarment from the practice of law in the Tenth Circuit and the District Court, Mr. Smith has no income from which his negative net worth could be reduced, or

apply for reinstatement to the District Court bar when he can demonstrate that the Tenth Circuit has lifted its suspension of him--another impossible task. Under these circumstances, Mr. Smith is clearly subject to restraints not shared by the public generally with respect to his liberty and property interests in his good name, reputation, honor and integrity, and in his right to practice law and make a living. As Mr. Smith alleged in his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence, the Tenth Circuit and District Court disciplinary panels deprived him of these liberty and property interests without Fifth Amendment due process of law. See Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.),

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from which harsh and unjustified sanctions of more than $50,000.00 could be paid.

cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Collie v. Vought Aircraft Company, U.S. App. LEXIS 9479 (5th Cir. May 12, 1998). It therefore follows that Mr. Smith was "in custody" for purposes of filing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence, and that Judge Daniel committed reversible error by finding and concluding otherwise, as did the Tenth Circuit hearing panel.

Under 28 U.S.C. § 2253, Mr. Smith had the right to receive meaningful appellate review of Judge Daniel's (January 21, 1998) order dismissing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence. See Hohn v. United States, ____ U.S. ____, 118 S.Ct. 1969, ____ L.Ed.2d ____ (1998); see also Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)("the

obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996)("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984)("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). Therefore, by issuing its (April 9, 1998) order affirming Judge Daniel's (January 21, 1998) order dismissing Mr. Smith's petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence without addressing the issues raised by him in his motion for issuance of certificate of appealability and in his appellate brief, the Tenth Circuit hearing panel deprived him of his right

to receive meaningful appellate review under 28 U.S.C. § 2253. See id.

In its (April 9, 1998) order, the Tenth Circuit hearing panel found and concluded as follows:

> In light of Mr. Smith's contumacious insistence on "attempts . . . to further litigate matters already determined by this court or foreclosed by previous determinations" sanctions are appropriate. In re David L. Smith, No. 95-1119 (10th Cir. Feb. 16, 1996), supra. His repetitive filings have strained the resources of this court, and this abuse of the judicial process must cease. See Winslow v. Hunter (In re Winslow), 17 F.3d 314, 316-17 (10th Cir. 1994). Mr. Smith has been warned in a previous order that his continued abuse could result in the imposition of sanctions." In re David L. Smith, No. 95-1119 (10th Cir. Feb. 16, 1996), supra.

However, the Tenth Circuit has not already "determined" the matters raised by Mr. Smith in his appeal of Judge Daniel's (January 21, 1998) order dismissing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence. Nor are these

matters "foreclosed by previous determinations" of the Tenth Circuit. Finally, it is not Mr. Smith's "repetitive filings" that have "strained the resources" of the Tenth Circuit, but rather the Tenth Circuit's own steadfast refusal to determine these matters on the basis of his previous filings. In other words, the Tenth Circuit has deprived Mr. Smith of his Fifth Amendment due process right to a full and fair opportunity to litigate these matters on their merits, and the doctrines of res judicata, collateral estoppel, and law of the case are therefore inapplicable to these matters. See Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)(court not required to accord full faith and credit to a constitutionally infirm judgment); Allen v. McCurry, 449 U.S. 90, 97, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Under these circumstances, the Tenth Circuit hearing panel committed reversible error by finding and concluding that "sanctions are appropriate" because of Mr. Smith's alleged "abuse of the judicial process."

By issuing its (May 13, 1998) order instructing the Clerk of the Tenth Circuit to refuse to accept for filing any submissions from Mr. Smith which further contest his suspension and disbarment from the practice of law in

the Tenth Circuit and the District Court, ordering him to pay $500.00 to the Clerk of the Tenth Circuit for appealing Judge Daniel's (January 21, 1998) order dismissing his petition for a writ of habeas corpus, and motion to vacate, set aside or correct sentence, and summarily denying his petition for order reinstating him to the practice of law in the Tenth Circuit and the District Court, as well as his request for an evidentiary hearing on this petition, the Tenth Circuit hearing panel deprived Mr. Smith of his First Amendment right to access to the federal courts to petition the government for a redress of grievances, as well as his Fifth Amendment right to due process of law. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v.

Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976)("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Collie v. Vought Aircraft Company, U.S. App. LEXIS 9479 (5th Cir. May 12, 1998); see also Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92 L.Ed.2d 476 (1948)(impossibility of performance constitutes a defense to contempt); United States v. Rylander, 460

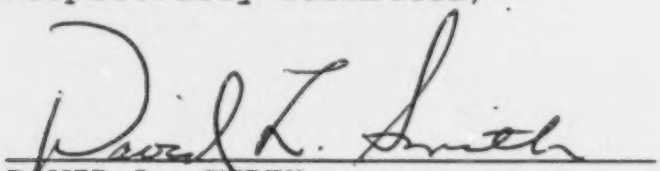
U.S. 752, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983)(the court must consider present inability to comply with the order in question); Tinsley v. Mitchell, 804 F.2d 1254, 1256 (D.C. Cir. 1986)(citing Maggio v. Zeitz). Further, by issuing its (June 1, 1998) order denying Mr. Smith's petition for rehearing of its (May 13, 1998) order without addressing the issues raised by him therein, the Tenth Circuit hearing panel demonstrated that it has no intention of reviewing, reconsidering and correcting the gross miscarriage of justice being perpetrated against him--another blatant and egregious violation of his First and Fifth Amendment rights. See id.

III. CONCLUSION

The United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the United States District Court for the District of Colorado, as to call for an exercise of this Court's supervisory power; has decided an important question of federal law that has not been, but should be, settled by this Court; and has decided an important federal question in a way that

conflicts with relevant decisions of this Court. For these reasons, Mr. Smith requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and to the United States District Court for the District of Colorado, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and declaring void ab initio the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, its (February 13, 1996) order of disbarment, the District Court disciplinary panel's (February 10, 1995) suspension order, its (April 26, 1996) order of disbarment, Judge Daniel's (January 21, 1998) order of dismissal, and the Tenth Circuit hearing panel's (April 9, 1998, May 13, 1998, and June 1, 1998) orders.

Respectfully submitted,



DAVID L. SMITH

1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

PRO SE ATTORNEY-PETITIONER

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:)
)
DAVID L. SMITH)

No. 93-631

Order
Filed November 29, 1993

Before SEYMOUR, BALDOCK and BRORBY, Circuit Judges.

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993). Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).
>
> Whether sanctions may be imposed against counsel for filing appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the court
PER CURIAM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 93-DP-28

IN THE MATTER OF DAVID L. SMITH

DISCIPLINARY ORDER
Filed February 10, 1995

On February 2, 1995, this matter was heard before the Disciplinary Panel of this Court. After hearing arguments and statements of counsel, reviewing all transcripts, exhibits and other documents in this matter, and considering carefully the issues, it is

ORDERED that identical discipline will be imposed by the United States District Court as was imposed by the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that David L. Smith is suspended as a member of the Bar of this Court. It is

FURTHER ORDERED that when the United States Court of Appeals for the Tenth Circuit lifts its suspension of Mr. Smith, he shall be required to apply for reinstatement in accordance with D.C.COLO.LR 83.6N. of the Local Rules of Practice of this court. It is

FURTHER ORDERED that David L. Smith shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this Order and that he shall in no way hold himself out as an attorney admitted to practice in this court be it by use of letterhead, business cards, advertisement or any other manner.

Dated at Denver, Colorado this 10th day of February, 1995.

BY THE DISCIPLINARY PANEL OF THE COURT:

ZITA L. WEINSHIENK, Judge

Edward W. Nottingham, Judge

Daniel B. Sparr, Judge

United States Court of Appeals
for the Tenth Circuit

In re:	)	
	)	No. 93-631
David L. Smith	)	

Order
Filed February 13, 1996

Before Seymour, Chief Judge, Baldock and Brorby, Circuit Judges

On December 14, 1995, this panel entered an order requiring respondent David L. Smith to show cause why he should not be disbarred for violating this court's November 1993 suspension order and for practicing in this court without authorization. On December 20, Mr. Smith filed his response. In ruling in this matter, the court has carefully reviewed that response, as well as the other pleadings filed to date in this disciplinary action. The court has determined that Mr. Smith's transgressions warrant disbarment.

Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was

filing frivolous appeals and failing to pay court ordered sanctions. Following briefing and oral argument, this panel suspended Mr. Smith from practicing in the Tenth Circuit. In re Smith, 10 F.3d 723 (10th Cir. 1993) (per curiam), cert. denied, 115 S.Ct. 53 (1994). Approximately one year later, Mr. Smith filed a request for reinstatement. This panel denied that request. See Order Denying Reinstatement, No. 93-631, (10th Cir. July 18, 1995).

During the course of his suspension, Mr. Smith continued to file briefs in this court. In particular, the court has identified four appeals in which Mr. Smith appears to have drafted briefs on behalf of the allegedly pro se appellants. Those appeals are 94-1127, Qualls v. Regional Transportation District, 94-1130, Dunkin v. Louisiana-Pacific Corporation, 94-1317, Howard v. Mail-Well Envelope Company, and 95-1198, Seales v. Jefferson County School District R-1. The December 14 show cause order was the culmination of this court's efforts to have Mr. Smith explain his involvement in these appeals.

In his response, Mr. Smith readily admits, as he has before, that he wrote and submitted the briefs in this court following the issuance of our suspension order. He maintains, however, that those submissions are not in violation of this

court's order because he signed two of the briefs in question and included footnotes admitting his involvement in the other two. He suggests that these admissions absolve him of any allegations of "ghost-writing." See Johnson v. Board of County Commrs., 868 F. Supp. 1226, 1231-32 (D. Colo. 1994)(discussing elements of ghost-writing). The argument follows that because he admits his assistance, he cannot be subject to discipline. Mr. Smith's arguments misperceive the nature of the problem.

Mr. Smith was advised, in very clear terms, that he no longer had permission to practice law in this court. He was told he could not act as an attorney for his clients or former clients. In writing and filing briefs on behalf of otherwise pro se litigants, he violated that order. This breach existed regardless of whether he signed the briefs or inserted footnotes. Following the suspension order, Mr. Smith was prohibited from helping his clients with their briefs.

Contrary to assertions made in the response, the court has been very careful to distinguish between efforts made on behalf of clients and Mr. Smith's right to appeal sanctions issues on his own behalf. The briefs in the four cases

identified asked for relief which went far beyond Mr. Smith as an individual. In 94-1127, for example, the alleged "pro se" brief requests relief in the form of reversing the district court's dismissal of certain claims and remand for an expedited jury trial on the merits. The front cover of that brief asserts it is being submitted by Mr. Qualls, not David Smith. We find it disingenuous for Mr. Smith to urge that these briefs only contained arguments personal to him.

Despite repeated warnings, Mr. Smith has chosen not to heed the orders of this court. He is, therefore, disbarred. His name will be stricken from the list of attorneys allowed to practice in this court. In addition, in accordance with Fed. R. App. P. 35(b), Mr. Smith's suggestion for hearing en banc was circulated to all judges of the court in regular active service. No member of the panel or the court has requested a poll. Therefore, the suggestion for en banc hearing is denied. The request for evidentiary hearing is likewise denied. Mr. Smith is referred to the office of the Circuit Executive to file any desired judicial misconduct complaint.

Entered for the Court

Per Curiam

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Disciplinary Action No. 96-DP-4

IN THE MATTER OF THE DISBARMENT OF
DAVID L. SMITH

ORDER OF DISBARMENT
Filed April 26, 1996

It appears that on February 13, 1996, the United States Court of Appeals for the Tenth Circuit disbarred DAVID L. SMITH from the practice of law in that Court effective February 13, 1996; it further appears that DAVID L. SMITH was admitted as a member of the Bar of the United States District Court for the District of Colorado on February 11, 1977 and that a Disciplinary Order entered in this Court on February 10, 1995 suspending DAVID L. SMITH. It further appears that on March 18, 1996, DAVID L. SMITH was notified by the Committee on Conduct by certified mail, return receipt, at his most current address on file with the Clerk of the Court of these proceedings. Pursuant to D.C.COLO.LR 83.6)., simultaneous and identical discipline will be imposed by the United States District Court for the District of Colorado nunc pro tunc from the date of judgment of the United States Court of

Appeals for the Tenth Circuit. DAVID L. SMITH was given ten (10) days to file an answer should he desire to oppose or contest said recommendation. It further appears that on March 20, 1996 DAVID L. SMITH filed an opposition to simultaneous and identical discipline. The Committee on Conduct has considered the response and recommends disbarment. The Court accepts the recommendation and it is therefore

ORDERED that pursuant to the Local Rules of Practice of this Court, DAVID L. SMITH is disbarred from the practice of law in this Court and his name shall be stricken from the roll of attorneys licensed to practice law in this Court. It is further

ORDERED that DAVID L. SMITH shall forward his certificate of admission to the Clerk of the Court within ten days from the date of this Order and that he shall in no way hold himself out as an attorney admitted to practice in this Court be it by use of letterhead, business cards, advertisement or in any other manner.

Dated at Denver, Colorado, this 26th day of April, 1996.

BY THE DISCIPLINARY PANEL OF
THE COURT

ZITA L. WEINSHIENK, Judge

EDWARD W. NOTTINGHAM, Judge

DANIEL B. SPARR, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Wiley Y. Daniel

Civil Action No. 97-D-2498

DAVID L. SMITH,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO and UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Respondents.

ORDER OF DISMISSAL
Filed January 21, 1998

Petitioner David L. Smith has filed a "Petition for a Writ of Habeas Corpus, and Motion to Vacate, Set Aside or Correct Sentence." The petition and motion is asserted pursuant to 28 U.S.C. § 2241 (1994), and 28 U.S.C. § 2255 (1994 & Supp. 1997). For the reasons stated below, the petition and motion will be dismissed pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

Mr. Smith has been disbarred from the practice of law in the United States Court of Appeals for the Tenth Circuit. See In re Smith, 76 F.3d 335 (10th Cir.), cert. denied, 117 S.Ct. 186 (1996). He also has been barred from the practice of law in this court. See In re Disbarment of David L. Smith, No. 96-DP-4 (D. Colo. Apr. 26, 1996), aff'd, No. 96-1254 (10th Cir. May 16, 1997). Mr. Smith contends that he was denied due process both in this court and in the Tenth Circuit throughout the disciplinary proceedings that resulted in his disbarments. As relief he asks this court to grant his petition and motion and to issue "an order reversing and declaring void ab initio the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, its (February 13, 1996) order of disbarment, the District Court disciplinary panel's (February 10, 1995) suspension order, its (April 26, 1996) order of disbarment, and its (May 2, 1996) order admonishing Mr. Smith and threatening to cite him for contempt of court 'if he continues to practice law in this District.'" Petition and Motion at 23.

Pursuant to Fed. R. Civ. P. 12(h)(3), the court must dismiss the action if the court lacks subject matter jurisdiction. Subject matter jurisdiction may be raised sua sponte by the court at any time during the course

of the proceedings. See McAlester v. United Airlines, Inc., 851 F.2d 1249, 1252 (10th Cir. 1988). "The party seeking to invoke the jurisdiction of the court must demonstrate that the case is within the court's jurisdiction." United States v. Bustillos, 31 F.2d 931, 933 (10th Cir. 1994). For the reasons stated below, I find that Mr. Smith is not in custody. Therefore, the court lacks subject matter jurisdiction and this action must be dismissed.

The fundamental purpose of a writ of habeas corpus pursuant to 28 U.S.C. § 2241 and a motion to vacate pursuant to 28 U.S.C. § 2255 is the same: "they are 'an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.'" McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811 (10th Cir. 1997)(quoting Preiser v. Rodriguez, 411 U.S. 475, 484 (1973)). The "in custody" requirement is designed to limit review "to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

Mr. Smith is not in custody. He is challenging the validity of court orders

that initially suspended and ultimately disbarred him from the practice of law in this court and in the Tenth Circuit. He alleges that:

> Under these circumstances, it is clear that Mr. Smith is "in custody" under or by color of the authority of the United States, for an act done or omitted in pursuance of an order, process, judgment or decree of a court or judge of the United States, and in violation of the Constitution or laws of the United States. See 28 U.S.C. § 2241. It is also clear that Mr. Smith is "in custody" under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. See 28 U.S.C. § 2255.

Petition and Motion at 22. These conclusory allegations do not establish that Mr. Smith is in custody. Even the most liberal definition of custody does not include an attorney who has been

disbarred from the practice of law because a disbarred attorney has not been subjected to a restraint on his liberty. Accordingly, it is

ORDERED that the "Petition for a Writ of Habeas Corpus, and Motion to Vacate, Set Aside or Correct Sentence" and the action are dismissed pursuant to Fed. R. Civ. P. 12(h)(3) for lack of subject matter jurisdiction.

DATED at Denver, Colorado, this 21st day of January, 1998.

BY THE COURT:

WILEY Y. DANIEL
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v. No. 98-1030

U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO; UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Respondents-Appellees.

ORDER
Filed April 9, 1998

Before EBEL, KELLY and LUCERO, Circuit Judges

This matter is before the court on David L. Smith's response to this court's order to show cause as to why the district court order dismissing his habeas petition and 28 U.S.C. § 2255 motion should not be summarily affirmed. See 10th Cir. R. 27.2.2.

Mr. Smith was suspended from practice in this court in 1993, suspended from the United States District Court for the District of Colorado in 1995, and disbarred from this court and the district court in 1996. Mr. Smith's disciplinary problems in this court have a long history. See In re David L. Smith, 10 F.3d 723 (10th Cir. 1993), cert. denied, 513 U.S. 807 (1994); In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, 117 S.Ct. 186 (1996); In re David L. Smith, No. 97-1121 (10th Cir. May 8, 1997)(unpublished order); In re David L. Smith, No. 95-1119 (10th Cir. Feb. 16, 1996)(unpublished order and judgment); In re David L. Smith, Nos. 96-1254/-1256 (10th Cir. May 16, 1997)(order and judgment filed under seal).

In addition to the matters disposed of by the orders and orders and judgments enumerated above, Mr. Smith filed in this court a motion for reinstatement and a petition for writ of habeas corpus and motion to set aside or correct sentence challenging his disbarment. Both of these motions were denied.

The subject of this appeal is the denial by the district court of Mr. Smith's "Petition for Writ of Habeas Corpus, and Motion to Vacate, Set Aside or Correct Sentence." In that motion, Mr. Smith again challenged his suspensions and subsequent disbarments.

The district court dismissed the petition, concluding that it lacked subject matter jurisdiction because Mr. Smith is not in custody. We affirm.

As a jurisdictional prerequisite the petitioner must be in custody when the application for habeas or § 2255 relief is filed. Carafas v. LaVallee, 391 U.S. 234, 238 (1968); United States v. Bustillos, 31 F.3d 931, 933 (10th Cir. 1994). To support jurisdiction, Mr. Smith argues that his disbarment is the equivalent of being in custody. However, Mr. Smith does not cite to any cases, and, indeed there are none, which determine that disbarment alone is sufficient to meet the "in custody" requirement.

Although disbarment is considered "quasi-criminal," In re Ruffalo, 390 U.S. 544, 551 (1968), and is costly for an attorney, In re Palmisano, 70 F.3d 483, 486 (7th Cir. 1995), it does not follow that one who has been disbarred is in custody for purposes of habeas or § 2255 proceedings. As noted by the district court, the fundamental purpose of both §§ 2241 and 2255 is to allow an "attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody." Moreover, § 2255 is inapplicable where there has been no criminal conviction. "The purpose of

section 2255 is to provide a method of determining the validity of a judgment by the court which imposed the sentence . . . ." Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996). Contrary to Mr. Smith's argument, his disbarment does not constitute a criminal conviction.

In light of Mr. Smith's contumacious insistence on "attempts . . . to further litigate matters already determined by this court or foreclosed by previous determinations" sanctions are appropriate. In re David L. Smith, No. 95-1119 (10th Cir. Feb. 16, 1996), supra. His repetitive filings have strained the resources of this court, and this abuse of the judicial process must cease. See Winslow v. Hunter (In re Winslow), 17 F.3d 314, 316-17 (10th Cir. 1994). Mr. Smith has been warned in a previous order that his continued abuse could result in the imposition of sanctions." In re David L. Smith, No. 95-1119 (10th Cir. Feb. 16, 1996), supra.

Accordingly, the following sanctions may be imposed against Mr. Smith: (1) the clerk of this court will be ordered to refuse to accept for filing any submissions from Mr. Smith which pertain to his disbarment from this court or from the district court; and (2) Mr. Smith will be ordered to pay to the Clerk of the United States Court of Appeals for the Tenth Circuit five hundred dollars

($500.00). Mr. Smith shall have twenty days from the date of this order to file written objections to these proposed sanctions. The response shall be limited to fifteen pages. These proposed sanctions will not be imposed until after the court has considered and ruled upon any objections filed by Mr. Smith within the time limit provided.

AFFIRMED. The mandate shall issue forthwith.

Entered for the Court
PATRICK FISHER, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v. No. 98-1030

U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO; UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Respondents-Appellees.

ORDER
Filed May 13, 1998

Before EBEL, KELLY and LUCERO, Circuit Judges

This matter comes on for consideration of David L. Smith's response to this court's order of April 9, 1998.

Upon consideration thereof, it is ordered that:

(1) the clerk of this court shall refuse to accept for filing any

submissions from Mr. Smith which further contest his disbarment from this court entered on February 13, 1996 or from the district court entered on April 26, 1996; and

(2) Mr. Smith shall pay to the Clerk of the United States Court of Appeals for the Tenth Circuit five hundred dollars ($500.00) within 10 days of the date of this order.

Mr. Smith's request for rehearing is denied by the panel that rendered the decision. The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

All other motions are denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DAVID L. SMITH,

Petitioner-Appellant,

v. No. 98-1030

U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO; UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Respondents-Appellees.

ORDER
Filed May 13, 1998

Before EBEL, KELLY and LUCERO, Circuit Judges

The Petition for Rehearing and Request for Transfer of This Matter to the United States Court of Appeals for the Federal Circuit is DENIED.

Entered for the Court
PATRICK FISHER, Clerk of Court

Amendment I of the Constitution of the United States provides as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

28 U.S.C. § 2241 provides as follows:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas

corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission,

order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2253 provides as follows:

> (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, by the court of appeals for the circuit in which the proceeding is held.
>
> (b) . . . .
>
> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
>
> (A) . . . .
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues

satisfy the showing required by paragraph (2).

28 U.S.C. § 2255 provides as follows:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine

the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order

entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.